In the High Court of Judicature at Madras

Dated: 28/10/2004

Coram

The Hon'ble Mr. Justice R. BALASUBRAMANIAN
and
The Hon'ble Mr. Justice N. KANNADASAN

Criminal Appeal No. 839 of 2002

1. Palanisamy

2. Palanisami

3. Thangaraj

All residing at
Govindankadu,
Sadayampalayam,
Konasamudhram Grammam. ... Appellants

-vs-

State,
rep. by Inspector of Police,
Esplanade Police Station,
Edapady. ... Respondent

Criminal appeal under Section 374 of Cr.P.C. against the conviction and sentence imposed upon by them by the learned Additional Sessions Judge, 1st Fast Track Court, Salem, in S.C. No: 31 of 2001 dated 24.0 4.2002.

:J U D G M E N T

(Judgment of the Court was
delivered by R. BALASUBRAMANIAN, J.)

The appellants in this appeal are A.1, A.3 and A.4 in S.C. No: 31 of 2001 on the file of the Additional Sessions Judge (Fast Track Court No: 1) Salem. A.2 was put up for trial along with the appellants and he died pending trial and therefore, the charge against him stood abated. For convenience sake, in this judgment we will refer the appellants in the same rank in which they were put up for trial before the Court of Sessions. Heard Mr. V. Gopinath, learned Senior Counsel appearing for the appellants and Mr. V. Arulraj, learned Government Advocate (Criminal side) for the State.

2. The charges framed by the learned Sessions Judge against the

accused are as hereunder :
302 I.P.C. - A.2 for having caused the death of Rangannan (hereinafter referred to as D.1)
302 r/w 34 - A.1 for having caused the death of Rangannan (D.1)
302 r/w 109 - against A.3 and A.4 regarding the murder of Rangannan (D.1)
302 r/w 34 - against A.1, A.3 and A.4 for having caused the death of Selva Kumar (hereinafter referred to as D.2)
302 r/w 109 - against A.2 regarding the death of Selva Kumar (D.2)
325 - against A.2 for having caused injuries on P.W.1

3. The prosecution examined, in support of their case, as many as 17 witnesses as P.Ws. 1 to 17 and marked 37 exhibits as Exs. P.1 to P.37. The defence did not let in either oral or documentary evidence. At the end of the trial, the learned Sessions Judge accepted the case of the prosecution and found the first accused guilty of the offence under Section 302 read with 34 I.P.C., for causing the murder of Rangannan (D.1), for which he stands sentenced to undergo imprisonment for life together with a fine of Rs.1,000/- carrying a default sentence; accused 1, 3 and 4 guilty for the offence under Section 302 read with 34 I.P.C., for causing the murder of Selva Kumar (D.2), and sentenced each one of them to undergo imprisonment for life together with a fine of Rs. 1,000/- carrying a default

sentence. For the rest of the charges the accused were acquitted. It is this judgment which is in challenge in this appeal.

4. The occurrence is shown to have taken place at about 7.00 p.m. on 20.01.2000. P.Ws. 1, 2, 3 and 5 have been examined as eye witnesses to the occurrence. P.W.1's evidence in short is as hereunder :

" Deceased No. 1 is her husband; Deceased No. 2 is her son; they are residing in the farm house itself; she knows the accused and they are residing in the adjoining lands itself; A.1 is her husband's younger brother; A.2 is her husband's elder brother; A.3 is the son of A.2; A.4 is the son of A.1; accused are also agriculturists by occupation; her husband and the accused have lands in the same area; there was a partition earlier in the family; irrigation to the partitioned lands is from a common well; irrigation from the common well would be on turn; P.W.2 is her son; A.1 is residing very close to the house of P.W.2; on the occurrence day it was the turn of the prosecution witnesses to irrigate their lands from the common well; therefore, she goes to the well at about 7.00 p.m. for the purpose of irrigating the lands belonging to them; all the accused on seeing her there told her that it is not their day to irrigate and therefore, she must immediately leave; apprehending that she may be assaulted, she left towards P.W.2's house; P.W.2's child was sick and therefore, D.1 and D.2 had gone to visit him; on seeing this witness coming towards the house of P.W.2, D.1 and D.2 came out of the house; the witness was being chased by the accused; on the two groups meeting each other D.1 asked

A.2 and A.1 as to why they are objecting to their turn of irrigating their lands from the well on that day; the witness would state that as she was being chased by the accused from the well she was openly stating that they are obstructing her from irrigating the lands from the well; at that time A.1 with an iron rod beat on both the shoulders of her husband (D.1); A.2 (since deceased) with a knife cut on the front side of the head of her husband (D.1); at that time D.2 intervened and questioned the accused as to why they are assaulting his father; A.3 with a stick assaulted on both the flanks of Selva Kumar (D.2); A.4 with a stick also assaulted on both the flanks and legs of D.2; A.1 took the knife from A.2 (since deceased) and with the blunt portion of the weapon assaulted on the backside head of D.2; witness shouted and at that time A.2 (since deceased) pulled the stick from A.3 and assaulted on both her hands resulting in a fracture; P.Ws.2, 3 and 4 witnessed the occurrence; P.W.2 shouted and all the accused left the scene with the weapons of offences; P.W.2 transported all the injured to the Government Hospital at Edapadi in a car and as the condition of Selva Kumar (D.2) was precarious, he was advised to be taken to the Government Head Quarters Hospital, Salem; witness and her husband (D.1) continued to take treatment in the Government Hospital at Edapadi and when all of them reached the hospital at Edapadi it was 9.00 p. m.; this witness and her husband were examined at 11.00 a.m. in the hospital on the next day and they were also referred to Government Head Quarters Hospital, Salem; on reaching the Government Head Quarters Hospital, Salem, they came to know that Selva Kumar breathed his last in the hospital at Salem; this witness and her husband were in patient in the hospital for 30 and 40 days respectively and thereafter, they were discharged; her husband died one day after he reached the house; M.Os. 1 to 4 are the weapons of offences in the hands of the accused and P.W.6 - her daughter informed the police about the death of her husband."

P.Ws. 2, 3 and 5 gave evidence regarding the occurrence proper in a manner similar to the evidence of P.W.1.

5. P.W.9 is the Casualty Medical Officer in the Government Hospital at Edapadi. When he was on duty at about 9.00 p.m. on 20.01.2000 (the occurrence day), Rangannan was brought before him and he examined him. At that time he informed P.W.9 that he received the injuries from four known persons at about 7.00 p.m. in the same day. He found various symptoms as noted by him in Ex.P.17, the accident register. The injuries are as hereunder :

"1. A cut injury right forehead 3 x 1cm skin deep, red.
2. Contusion in the left shoulder 2 x 2 cm. Red. complains of pain all over the body."

He also examined P.W.1 at 11.00 p.m. for injuries stated to have been sustained by her at about 7.00 p.m. on the same day at the hands of five known persons. On her, he found various symptoms as noted by him in Ex.P.18, the wound certificate. The symptoms are as here under :

" 1. A diffused contusion right dorsum of hand - red.
2. A diffused contusion left fore arm - red.
3. A diffused contusion left dorsum of hand - red.
4. A contusion right foot dorsom 2 x 2 cms - red.

complains of pain all over the body."

On an x-ray taken for the injuries sustained by P.W.1 it was found that she had suffered fractures in the right and left hands as well as in her fingers. Injuries 1 and 2 found on her are grievous in nature and others are simple in nature. Weapons like M.Os. 3 and 5 could have caused those injuries found on her.

6. P.W.13 is the head constable on duty in the investigating police station on 21.01.2000. At 7.00 a.m. on that day, he received information from Government Hospital at Edapadi about Rangannan having been admitted in the hospital. He reached the hospital at 7.30 a.m. and by examining Rangannan, recorded his statement in which he had taken his left thumb impression. Ex.P.25 is the said statement recorded by him. He came back to the police station with Ex.P.25 and registered it at 9.30 a.m. in Crime No: 99 of 2000 for offences under Section 323, 324 and 326 I.P.C. Ex.P.26 is the printed first information report prepared by him. He sent the material records to higher officials as well as to the Court.

7. P.W.14 is the Sub Inspector of Police, in the investigating police station. On seeing the crime registered by P.W.13, he reached the scene of occurrence at 10.00 a.m. on the same day and in the presence of witnesses he prepared the Observation Mahazar Ex.P.8 and rough sketch Ex.P.28 in the presence of P.W.7 and another. He went to the Government Hospital at Edapadi and examined Rangannan (D.1) and Palaniammal (P.W.1) and recorded their statements. Ex.P.29 is the statement recorded by him from Rangannan. In the presence of the same witnesses at about 12.15 p.m. on the same day he recovered M.O.5 blood stained half sleeve shirt, M.O.6 blood stained T.shirt and M.O.8 a blood stained dhoti produced by Rangannan under Ex.P.9. He examined P.W.3 and others and recorded their statements. He received information from the Government Head Quarters Hospital, Salem, about the death of Selva Kumar (D.2) at about 5.30 p.m. and reached the police station at 7.00 p.m. Ex.P.30 is the death intimation as regards Selva Kumar. On that intimation, he altered the section of offence already registered by adding Section 302 I.P.C. and prepared Ex.P.31, the altered express F.I.R. He sent that material record to the Court as well as to the higher officials. P.W.6, daughter of D.1, appeared before him in the police station on 04.03.2000 and told him that her father died at about 4.00 p.m. on 4.3.2000. He reduced into writing the information given by P.W.6 which stands marked in this case as Ex.P.7. On that statement he altered the section of offence by adding the offence under section 302 (2 counts) and prepared the altered F.I.R. Ex.P.3 2 is the printed F.I.R. He sent that material records to the Court as well

as to higher officials. He handed over the altered F.I.R. to the Inspector of Police, Kakkanpalayam Police Station, who was in-charge of the investigating police station.

8. P.W.15 is the first investigating officer in this case. On the

complaint registered for offence under Section 302 I.P.C. among other offences, he proceeded to the Government Hospital at Salem and at 8.00 a.m. on 22.01.2000. He conducted inquest over the dead body of Selva Kumar (D.2) in the presence of Panchayatdars and witnesses. Ex. P.33 is the inquest report prepared by him. During inquest, he examined P.Ws.2, 3, 5, 6 and others and recorded their statements. He also examined Rangannan who was alive at that time, P.W.1, 7 and others and recorded their statements. Ex.P.34 is the statement of Rangannan recorded under Section 162 of Cr.P.C. when he was alive. He came to know that the accused in this case had surrendered before the Court of Judicial Magistrate No: 3, Salem, on 25.01.2000 and accordingly, he moved an application before that Court on 31.01.2000 to take police custody of all the accused. The Court granted police custody of all the accused for three days from 01.02.2000 to 03.02.2000. At 6.00 p.m. on 3.2.2000 he examined A.1 and at that ti me he gave a voluntary confession statement in the presence of P.W.8 and another, the admissible portion of the said statement is Ex.P.10. A.2 also gave a confession statement in the presence of the same witnesses and the admissible portion of the same is Ex.P.11. A.3's confession recorded in the same manner is Ex.,P.12 while the admissible portion of the confession statement of A.4 recorded in the similar manner is Ex.P.35. Pursuant to the confession statement of A.1 M.O.1 came to be recovered under Ex.P.13 in the presence of the same witnesses. Pursuant to the confession statement of A.2, M.O.2 came to be recovered in a like manner under Ex.P.14. M.O.3 came to be recovered pursuant to the confession statement of A.3 under Ex.P.15. M.O.4 came to be recovered in a like manner pursuant to the confession statement of A.4 under Ex.P.16. The accused were brought back to the police station and the material objects were sent to the Court. He examined further witnesses and recorded their statements. He gave a requisition to the Court to record the statements of P.Ws.1, 2, 3 and 5 under Section 164 of Cr.P.C. He sent the requisition to the Court to subject the blood stained incriminating objects, already recovered and sent to the Court, for chemical examination. He examined the Doctors and recorded their statements. As he retired on 31.3.2000 his successor took up further investigation. His successor is P.W.16. On the section of offence having altered into one under Section 302 (2 counts) as a result of the death of Rangannan (D.1), he went to the village where he died at 6.30 p.m. on 4.3.2000 and prepared Ex.P.36 the Observation Mahazar. Between 7.00 p.m. and 9.00 p.m. he conducted inquest over the dead body in the presence of witness and panchayatdors and prepared Ex.P.37, the Inquest Report. During inquest he examined P.Ws. 2, 3 and 6 and recorded their statements. He sent the dead body to the hospital with a requisition for post mortem.

9. P.W.10 is the Medical Officer working in the Government Head Quarters Hospital, Salem, who, on receipt of Ex.P.19 the requisition for post mortem relating to Selva Kumar (D.2), commenced post mortem at 00.30 a.m. on 22.01.2000. During post mortem he found various symptoms on the dead body as noted by him in Ex.P.20, the post mortem report. The symptoms are as hereunder :

" INJURIES:

1. Abrasions on left elbow 3 x 2 cm, left knee 3 x 1 cm and 5 x 2 cm, left arm 8 x 1 cm and 3 x 1 cm, left fore arm 3 x 1 cm, 2 x 1 cm & 1 x

1 cm, 5 x 2 cm & 1 x + cm, left leg 3 x 1 cm, 2 x 1 cm, 4 x 1 cm, 3 x 2 cm, 2 x 1 cm, & 5 x 2 cm & 3 x 1 cm, Right fore arm 3 x 2 cm, 2 x 1 cm, 1 x 1 cm, 0.5 x 0.5 cm, right hand 3 x 2 cm, right leg 2 x 1 cm, 3 x 2 cm, 0.5 x 0.5 cm, 1 x 1 cm, right arm 3 x 1 cm, Right side of fore head 2 x 1 cm, left side of fore head 1 x 0.5 cm.
2. A sutured laceration on left leg 3 x 1 x 0.5 cm.
3. A contusion on left side of chest 5 x 4 x 0.5 cm, d. red.
4. Fracture of ribs 4,5,6,7, 8 on left side and contusion on upper lobe of left lung 2 x 1 x 0.5 cm d. red.
5. Contusion on occipital region of scalp 6 x 4 x 0.5 cm d. red.
6. Subdural and Subarachnoid haemorrhages present over both cerebral hemispheres.
OTHER FINDINGS:-
Finger nails bluish. Heart: Normal.
Coronaries Patent.
Lungs: Congested & Oedematous,
Larynx & Trachea Hyoid bone: intact
Stomach: 150 gms of brownish yellow coloured fluid.
No specific smell, mucosa congested.
Liver, Spleen, Kidneys: Congested.
Pelvis: Intact.
Brain : Dedematous on cut section.
The Doctor is of the opinion that the deceased died due to the effects of multiple injuries".

10. P.W.4 is the other Doctor in the Government Head Quarters Hospital, Salem, who conducted post mortem at 11.15a.m. on 05.03.2000 on the body of Rangannan (D.1) on receipt of the dead body as well as Ex.P.3, the requisition. During post mortem, he found various symptoms as noted by him in Ex.P.4, the post mortem report. The symptoms are as hereunder :
" External Injuries :
1. Vertical healed sutured wound without sutures, 6 cms. In length over the right side of forehead, 4 cm above the inner end of right eyebrow.
2. Healed abrasion 3 x 1 cm with hard, dry, black, loosely attached scab in the middle of an almost resolved contusion of 6 x 2 cms over the outer aspect of upper 1/3 of right upper arm.

3. Healed abrasion 3 x 2 cms with hard, dry, black, loosely attached scab over the right hip.

Internal Injuries :
1. Vertical healing cut fracture 5 cms in length beneath external injury No:1, the lower end of which was found continuing as healing fissured fracture transversely over the whole of frontal bone and then obliquely backwards over the middle of whole of left parietal and left temporal bones of vault of skull.
2. Thin resolving sub-dural and arachnoid haemorrhage over the entire surface of both cerebral hemisphere of brain.
3. Softening found over an area of 3 x 2 x 1 cms in the middle of left parietal lobe of brain. O/S. the entire brain was found to be oedematous.

Internal Examination :
Heart : Chambers and valves normal. Cavities contained dark fluid blood. Coronary vessels : patent. Great vessels : Raised yellowish patches of atheroma seen in the walls fo root and arch of aorta. Lungs: Both on c/s. Congested and oedematous. Hyoid bone : Intact. Stomach: contained 400 gms of yellowish brown semisolid partly digested cooked corn porridge with no specific smell. Mucose: congested. Duodenum : Empty. Mucosa : congested. Liver, Spleen and Kidneys : C/s. Congested. Bladder : Empth. Pelvis : intact. Membranes : Intact. Spinal Column : Intact. "
The Doctor is of the opinion that the deceased would appear to have died due to the effects of head injuries.

11. P.W.6 is not an eye witness to the occurrence. She is the daughter of P.W.1 and deceased No: 1. P.W.7 witnessed the preparation of Ex.P.8, the Observation Mahazar and recovery of M.Os. 5 to 7 under Ex.P.9. P.W.8 witnessed the examination of all the accused during police custody; recording their confession statements, the admissible portions of which have already been indicated by us earlier in this judgment, and the recovery of various material objects already referred to. P.W.11 is the Magisterial clerk who speaks about the receipt of the case properties, requisition given by the police officer, sending the same to the laboratory with Court's letter and receipt of Exs. P.23 and P.24, the chemical examiner's report and serologists report. P.W.12 is the photographer through whom M.O.8 series and M.O.9 series are proved. P.W.17, after verification of the investigation already done by his preceding officer, completed the investigation and filed the final report in Court on 19.04.2000 against all the accused for offences under Section 324, 326 and 302 read with 34 I.P.C. When each of the accused were questioned under Section 313 of Cr.P.C. on the basis of the incriminating materials made available against each one of them, they denied each and every circumstance put up against them as false. They neither examined any witness on their side nor brought any documentary evidence. But, however, A.1, A.3 and A.4 have filed their written statements stating that due to prior enmity the case has been foisted upon them.

12. Mr. V. Gopinath, learned Senior counsel appearing for the appellants would attack the judgment under challenge on the following grounds :
" Ex.P.25 is the earliest information lodged by Rangannan, since deceased; it becomes admissible as a dying declaration on his death; besides Ex.P.25, Exs. P.29 and P.34 are the statements recorded by the police from Rangannan during investigation; if the oral evidence of P. Ws. 1 to 3 and 5 is tested in the context of the averments contained in Ex.P.25, (contents of Exs.P.29 and P.34 are similar to the contents of Ex.P.25) then it is clear that the prosecution has definitely deviated in its case from what is found stated in Ex.P.25. The deviation is regarding the place of occurrence; the manner in which the occurrence is shown to have taken place and the other circumstances. Having regard to the deviation on material aspects in the evidence of P.Ws.1 to 3, 5, this Court has to necessarily reject their evidence as unacceptable and if that is done, then there being no other legal evidence to connect the accused in the crime subject to Ex.P.25 being in the nature of a dying declaration given to a police officer, the conviction has to be set aside".

Without prejudice to the above contentions, the learned senior counsel would argue that accepting the averments contained in Ex.P.25 as true, even then, the conviction of the accused for the offence under Section 302 read with 34 I.P.C. cannot be legally sustained. Learned senior counsel elaborated on this point by highlighting as to what should be taken note of when an accused is sought to be punished based on constructive liability covered under Section 34 I.P.C. We heard Mr. V. Arul, learned Government Advocate (Criminal side) on the above points.

13. P.Ws. 4 and 10 are the two respective Doctors who did post mortem on the body of D.1 and D.2. The respective post mortem reports are Exs.P.4 and P.20. The medical evidence shows the victims in this case died due to homicidal violence. But, we find that the accused are disputing the cause of death of Rangannan by cross examining the doctor on that aspect. Therefore, there is no difficulty at all in holding that the prosecution definitely established that one of the victims, namely Selva Kumar, died due to homicidal violence and the cause of death of the other is a debatable point. The prosecution had examined P.Ws. 1 to 3 and 5 as eye witnesses to the occurrence. The earliest information in this case is Ex.P.25 which was given by Rangannan (D.1) while he was alive. Only on the contents of Ex.P.25, the crime had come to be registered and Ex.P.26 is the accompanying printed First Information Report. Therefore, we have to necessarily hold that Ex.P.25 is the basis on which the prosecution case has to be decided. We went through the contents of Ex.P.25. In sum and substance it shows the following :

" P.W.1 went to the well to irrigate the lands; all the accused were disputing her at that time; seeing that D.1 and D.2 ran towards that place and asked the accused as to what is happening; the accused asserted that it is their turn day to irrigate and therefore, the prosecution side should not take water from the well; Rangannan (D.1) asserted his right to irrigate; A.1 at that time, challenging his authority to say so, with an iron rod, beat him on his right and left shoulders; A.2 with a knife in his hand cut him on his forehead; Selva Kumar (D.2) intervened and A.3, with a stick, beat him on both his legs; A.4, with a stick, beat him indiscriminately on his hands and body and A.1 stabbed on the backside head of Selva Kumar (D.2); P.W.1 intervened and A.2 with a stick assaulted her on both the hands."

From a perusal of the contents of Ex.P.25, it is clear that the occurrence appears to have taken place only near the common well. No other place can be visualised from Ex.P.25 as the scene of occurrence. P.W.14, the Sub Inspector of Police, would state that none of the witnesses examined by him, during investigation, specified any particular place as the place where the occurrence had taken place. He would admit that his investigation did not reveal that occurrence took place in the lands of Elumalai or near their lands or near the footpath near that land. P.W.15 the investigating officer would also admit the said fact in his evidence in cross. He would admit that the scene of occurrence brought by the prosecution before the Court now as lands belonging to Elumalai is at a distance of one furlong from the common well. Therefore, in the face of the evidence of P.Ws.14 and 15 as referred to above and the contents of Ex.P.25, we are of the opinion that the place of occurrence can be safely fixed as the common well alone.

14. In Ex.P.25 we do find, as contended by the learned senior counsel appearing for the appellants, that except mentioning the presence of P.W.1 at that place, the presence of P.Ws.2, 3 and 5 as eye witnesses to the occurrence had not been disclosed. P.W.15, the investigating officer would also state that P.Ws. 2, 3 and 5, during investigation, did not disclose that during the occurrence time they were at the scene of occurrence and that they questioned the accused as to why they are assaulting the victims and requested the assailants to spare the witnesses. The argument of Mr.V.Gopinath learned senior counsel is that, therefore, the presence of P.Ws.2, 3 and 5 as occurrence witnesses have to be necessarily disbelieved. We see no reason at all as to why we should not agree with the submission made by the learned Senior Counsel. P.W.3 is the wife of P.W.2. P.W.2's evidence is that his house is situated 600 ft. away from the common well. P.W.5 would state that the place where he resides is 2 + kms. away from the scene village and 2 kms. away from the common well. Therefore, there is every possibility of P.Ws. 2, 3 and 5 being brought as eye witnesses to the occurrence by the prosecution later on to lend support to the evidence of P.W.1. We have already stated that having regard to the contents of Ex.P.25; the admission of P.W.15, the Investigating Officer as to what was not disclosed to him by P.Ws. 2,3 and 5 during investigation, we have a lingering doubt in our mind as to whether P. Ws. 2,3 and 5 would have been present at the scene of occurrence at all when the crime was shown to have been committed. Consequently, we are concluding, on the materials referred to above, that it would not be safe to accept the evidence of P.Ws.2, 3 and 5 as eye witnesses to the occurrence.

15. Therefore, this leaves the Court with the oral evidence of P.W.1 and the contents of Ex.P.25. We have already stated that the evidence of P.W.1 is in deviation to the contents of Ex.P.25 mainly regarding the place of occurrence. In this context, it may be seen that the evidence of P.W.1 is that on the accused challenging her right to irrigate her lands from the common well, she, apprehending that she may be assaulted, started going towards the house of P.W.2 during which time she was openly proclaiming that her right to irrigate the lands were interfered with by the accused and such open proclamation alone attracted the attention of her husband and son to come out of the house of P.W.2, where the occurrence is shown to have taken place. Whether this evidence placed before the Court by her can be accepted or not has to be necessarily verified in the context of the statement recorded from her during investigation. P.W.14 commenced investigation first in this case when the crime was not registered for the offence under Section 302 of I.P.C. He would admit categorically in his evidence that,
"P.W.1 did not tell him that apprehending that she may be assaulted and out of fear she went towards the house of P.W.2; she did not say that her husband and son viz. D.1 and D.2 visited the house of P.W.2 to see his ailing child and therefore, they were there; she did not say that on she being obstructed to irrigate when she proceeded towards the house of P.W.2 she was chased by the accused".

16. P.W.15, the Investigating Officer, who took up investigation after the crime was altered by adding and Section 302 I.P.C., would state in his evidence in cross as follows :
" P.W.1 did not tell him during investigation that out of fear of bodily

injury at the hands of the accused when she was prevented from irrigating, she went towards the house of P.W.2."
P.W.15 in his evidence would admit what was spoken to by P.W.14 in his evidence as extracted above. Therefore P.W.1's evidence in Court namely, "when she went near the well to irrigate, the accused intervened with her right; apprehending bodily injury at their hands she went to the house of P.W.2; she was chased by the accused; she was openly proclaiming about the threat given to her by the accused; her husband and son (D.1 and D.2) were in the house of P.W.2 at that time having visited earlier to see the ailing child; at that time they came out of the house and then the occurrence took place",
is not in conformity to her statement recorded during investigation. In other words, it is definitely an improvement in Court with a view to change the scene of occurrence from near the well to a far off place. Therefore to that extent it is clear in our mind, namely P.W.1 is a witness who is capable of improving the case of the prosecution to suit to the need of the situation. But one thing is certain namely the occurrence took place on the fateful day at about 7.00 p.m. near the common well. The persons present at the scene of occurrence during that time are P.W.1, all the accused, D.1 and D.2. It is clear from the contents of Ex.P.25 that it is the deceased who ran towards the well to counter check the attitude of A.1 to A.4 who according to the prosecution was telling P.W.1 that she cannot irrigate on that day. It is not as though, the accused went after the victims in this case. P.W.1's evidence that she had sustained injury at that time is corroborated by P.W.9, the casualty medical officer who examined her and gave Ex.P.18, the accident register. Therefore, at the risk of repetition we state that the occurrence had taken place at about 7 .00 p.m. on the day in

question near the common well wherein P.W.1, D.1 and D.2, as a body, came in confrontation with all the accused. As far as the overt acts attributed to the various accused vis-a-vis the victims in Ex.P.25 we find corroboration in the oral evidence of P.W.1. Therefore, there is no difficulty at all in holding that the evidence of P.W.1 as to how she, her husband (D.1) and her son (D.2) came to be attacked has to be necessarily accepted and in any event it cannot be doubted since it is on the same lines as disclosed in Ex.P.25. We are prepared to accept the contents of Ex.P.25 as a true version. Though it had been given to the police, it is the earliest information, which is crisp in nature and gives a clear picture as to what happened and what was the dispute that was in the minds of the parties at that time preceding the attack. Therefore, we hold, as already stated, that the evidence of P.W.1 definitely establishes the various overt acts attributed to all the four accused including A.2, since deceased, vis-avis P.W.1, D.1 and D.2. So far as the injuries suffered by P.W.1, it is in evidence that A.2, since deceased, is responsible for causing the injuries to her. Since he is dead, the charge stands abated.

17. On the above conclusion of ours, what this Court is called upon to decide now is as to whether the conviction under Section 302 read with 34 I.P.C. imposed against the surviving accused namely A.1, A.3 and A.4 with reference to the death of Rangannan (D.1) and Selva Kumar (D.2) can be legally

sustained or not ? To recollect the conviction given by the trial Court, we note here that A.1 stands convicted for the death of Rangannan (D.1) under Section 302 read with 34 and A.1, A.3 aand A.4 stands convicted for the offence under Section 302 read with 34 I.P.C. for the death of Selva Kumar (D.2). We will examine now the persons responsible for causing the death of Rangannan (D.1) which we can cull out from the oral evidence of P.W.1 in the context of the contents of Ex.P.25. The sequence of events that had taken place in this context is A.1 with an iron rod beat on the right and left shoulders of Rangannan followed by A.2 cutting on the front head of Rangannan. These are the two overt acts attributed to the two accused referred to above relating to the death of Rangannan. P.W.4 is the Doctor who did post mortem on Rangannan and Ex.P.4 is the post mortem report. The cause of death is stated to be the effects of head injuries. Admittedly, the act of causing the head injury is attributed to A.2, since deceased. The corresponding overt act attributed to A.1 is injury Nos: 2 and 3 noted in the post mortem report. Injury Nos: 2 and 3 we have already extracted. The medical evidence do not show that the injuries caused by the first accused is in any way responsible for the death of the victim. The conviction of A.1 is under Section 302 read with 34 namely he shared the common intention in causing the death of the victim with A.2, who alone caused the fatal attack. We leave it here at this stage for further discussion later on. As far as the death of Selva Kumar is concerned, P.W.10 is the Doctor who did post mortem and Ex.P.20 is the post mortem report. The sequence of events leading to his attack as could be culled out from the contents of Ex.P.25 is as here under :

" On Selva Kumar intervening, A.3, with a stick, beat him on both his legs; A.4, with a stick, beat him on his hands and on the body and at that time A.1 with a knife stabbed him on his backside of the head".
P.W.1 in her evidence would state that A.3 with a stick attacked on the flanks of Selva Kumar. This is in deviation of what is found stated in Ex.P.25 as the overt act of A.3. Therefore even at this stage going by the contents of Ex.P.25, we are not inclined to believe the evidence of P.W.1 regarding the overt act of A.3 vis-a-vis Selva Kumar.
From Ex.P.20 it is seen that the cause of death is due to the effects of multiple injuries. The doctor in his evidence would state that the cumulative effects of injuries 2 to 6 would result in the death in the ordinary course of events. The Doctor in his evidence in cross would admit that the head injury is responsible to the extent of 80 % in causing the death and the injuries found on the chest are responsible to the remaining extent of 20% in causing the death of the victim. Head injury is shown to have been caused by A.1 while, the injuries on the chest is shown to have been caused by A.4 in Ex.P.25. Therefore, injury No: 2 stands excluded as an injury which is likely to cause death in the ordinary course of events.

18. Since the conviction of all the accused is under Section 302 read with 34 I.P.C., as to what should be the criteria that must be satisfied before the conviction can be rendered on the basis of constructive liability is the subject matter of a number of decisions of the Hon'ble Supreme Court of India. In 2004 A.I.R. S.C.W. 810 (Girija Shankar vs. State of Uttar Pradesh) and 2004 A.I.R. S.C.W. 1071 (Raju Pandurang Mahale vs. State of Maharashtra and another), the Hon'ble Supreme Court, while considering the

impact of Section 34 of I.P.C. in a given situation had laid down the law as follows :

" In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was a plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of moment; but it must necessarily be before the commission of the crime".

In the judgment reported in 2003 (6) A.I.R. S.C.W. 5729 (Parasa Raja Manikyala Rao and another vs. State of Andhra Pradesh), while considering the impact of Section 34 of I.P.C., the Hon'ble Supreme Court of India held as follows:

" Leading feature of this section is the element of participation in action. The essence of liability under this section is the existence of a common intention animating the offenders and the participation in a criminal act in furtherance of the common intention. The essence is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. ..... Under this section a pre-concert in the sense of a distinct previous plan is not necessary to be proved. ..... Though common intention may develop on the spot, it must, however, be anterior in point of time to the commission of offence showing a pre-arranged plan and prior concert."

In the judgment reported in 2003 (1) A.I.R. S.C.W. 520 (Cherlopalli Cheliminabi Sahem and another vs. State of Andhra Pradesh), taking note of the fact, while considering a case falling under constructive liability based on Section 34 of I.P.C., that altercations started between two ladies in regard to taking water from a tap which turned out to be a fight in which both the families joined and somebody stabbed the deceased, the Court held that if it was not pre-planned and when there is no material to show the common int ention, Section 34 of I.P.C. is not attracted.

19. From the law laid down by the Supreme Court it is clear as to what should be the real material that should enter the mind of the Court while considering the conviction of an accused under Section 34 of I.P.C. and for that the Court has to see the facts available in each case. It is seen from the evidence in this case that the right to irrigate claimed by the prosecution side was denied by the accused on the fateful day and the deceased ran to the common well to question the act of the accused in denying their right to irrigate their lands from the common well on that day. It is also seen, as already extracted, that words were exchanged between the two parties and at that time the assaults, one after another as referred to above, had taken place. We have already noted that the overt acts attributed to the various accused in Ex.P.25 more or less finds corroboration in the evidence of P.W.1 except the overt act of A.3 vis-a-vis Selva Kumar. As far as the death of Selva Kumar (D.2) is concerned, the sequence of events are, " on Selva Kumar intervening, A.3 beat him on his legs followed by A.4 beating him on his hands and body with a stick". Only thereafter, as could be seen from Ex.P.25, A.1 stabbed on the backside head of Selva Kumar (D.2). P.W.1 in her evidence in chief would state that A.1 snatching the knife from the hands of A.2 (since deceased) caused a cut injury with the blunt portion of that weapon on the backside head of Selva Kumar. Thus the evidence makes one thing very clear

namely A.1 was not originally armed with a deadly weapon, viz. a knife, which he came to possess from A.2 only after A.3 and A.4 attacked Selva Kumar. From the above sequence of events, it is clear to our mind that A.3 and A.4 would not even have dreamt, when they attacked Selva Kumar with stick as referred to above one after the other, that A.1 would come to possess a knife which he would use fatally against the victim. We have referred to the judgments of the Supreme Court in the earlier paragraphs of this judgment which laid down the law that the common intention shall in any event precede the commission of the actual crime. Inasmuch as A.1 did not have a weapon in his possession at that time when A.3 and A.4 attacked Selva Kumar, it cannot be said that A.3 and A.4 would have even thought of or foreseen that A.1 would come to possess a weapon which he would use against Selva Kumar. It must be noticed here that the commission of crime by A.3 and A.4 is prior to the act of A.1. Therefore, we have no doubt at all in our mind that at that time when A.3 and A.4 choose to attack Selva Kumar (D.2), and having regard to the part of the human anatomy which each one chose to inflict the injuries, it is clear that their main intention is only to cause an injury on Selva Kumar which would make him move away from the well and thereby stop the irrigation. Under these circumstances, we are definite in our mind to hold that they could not have shared a common intention with A.1 who is shown to have caused an attack on the head of the victim. Coming to the act of A.1, we find that he had chosen to use the blunt portion of the weapon while he attacked Selva Kumar. In this context, we refer to the judgment brought to our notice by Mr. V.Gopinath, learned Senior counsel appearing for the appellants reported in 1993 Crl. Law Journal 64 (S.C.) (Hardev Bhanji Joshi vs. State of Gujarat). The facts in that case was that the accused who was before the Supreme Court had given only one blow and that too the sharp edge of the axe was not used and the whole incident was not a premeditated act and had happened in a sudden manner in a quarrel. Having regard to those facts, the Hon'ble Supreme Court held that the conviction under Section 302 of I.P.C. cannot be sustained and brought his conviction under Section 304 Part II of I.P.C. A Division Bench of this Court in the judgment reported in 1989 Law Weekly Criminal 496 (Kuttappan @ Sugathan in re) finding that the accused in that case removed the blade portion from the handle of the spade and inflicted two cuts only with the handle of the spade, held that conviction under Section 302 of I.P.C. cannot be sustained and altered it to one under Section 304 Part I of I.P.C. In this case we have already referred to the oral evidence of P.W.1 who would depose that A.1 after possessing the weapon from the custody of A.2 used only the blunt portion of that weapon in causing the injury on the head of Selva Kumar (D.2).

20. In the same breadth we analysed the overt acts attributed to the accused in causing the death of Rangannan (D.1). The occurrence was on 22.01.2000. He died on 4.3.2000. The cause of death is due to effects of head injuries. In Ex.P.25, it is shown that A.1 attacked Rangannan with an iron rod on his right and left shoulders followed by A.2, with a knife in his hand, cutting on his head. The reasons given by us to disbelieve the sharing of common intention of A.3 and A.4 with A.1 in causing the fatal attack on Selva Kumar is equally applicable to the present act of A.1 followed by the act of A.2 which ultimately resulted in the death of Rangannan (D.1). Head injuries admittedly have been caused only by A.2. The Act of A.2 succeeded

the act of A.1. The whole incident namely the attack on both the deceased as well as P.W.1 appeared to have happened in a quarrel over the dispute as to whose turn it is to irrigate from the common well on that day. As we have already noticed it is not as though the accused went after the victims in this case and attacked them. But on the other hand, it is the victims who ran towards the well and started questioning the accused who denied P.W.1 her right to irrigate the lands from the common well. If the entire case is viewed from that angle, it is clear in our mind that the very fact that A.1 had chosen to attack only the shoulders of Rangannan that too with an iron rod and that injury not shown to be the cause of death, it cannot be said that A.1 shared any common intention with A.2 to cause the death of Rangannan. In other words, following the judgments of the Hon'ble Supreme Court of India referred to above and the fact that A.1 attacked only on non-vital part of Rangannan's body, it is clear in our mind that at the time when A.1 committed the act, it cannot be said that, he had shared any common intention with A.2 to murder the victim. It is A.1 who first attacked followed by the act of A.2. Therefore, A.1's case must be considered only for his individual act and not on the basis of any constructive liability covered under Section 34 of I.P.C. If that is done, A.2 alone is shown to have caused the fatal injury and since he died, the charge against him stands abated. One disturbing feature in this case is the cause of death of Rangannan. P.W.4, in his evidence in cross would give answers both for and against the accused. In his cross examination he would admit as follows :

" He did not give any treatment to the injured; in a medico legal case, the injured would be discharged only after he was fully cured; he knows that Rangannan was discharged from the hospital; from the records available (none of the records produced before the Court) it is seen that Rangannan was given proper medical treatment and only after his wounds healed, he was discharged; it is not possible to say that since the injured had been discharged after his wounds healed, there is no scope for the death from those injuries; the medical record show (none produced in Court) that he was advised to take treatment thrice a week as an out patient till he completely recovers; from the above it is clear that the victim did not recover completely; the Doctors in charge of the Orthopadic department were of the opinion that it is enough if the victim takes treatment as an out patient and it appears that only on that conclusion he was discharged."
The fact remains that the victim who was admitted in the hospital on 22.01.2000 was discharged on 2.3.000 and he died on 4.3.2000. The evidence of the Doctor as referred to above show that from the records he could depose that the victim was given a complete medical treatment and then only he was discharged. As already stated Rangannan was alive for more than a month after receiving the injury.

21. We have the facts noted earlier in paragraphs 19 and 20 in our mind to finally dispose of this criminal appeal as hereunder :

" a. The conviction of A.1 for the offence under Section 302 read with 34 of I.P.C. for causing the death of Rangannan is set aside and he is accordingly acquitted of that offence. Having regard to the nature of injuries caused by him on the right and left shoulders of Rangannan (Injury

Nos: 2 and 3 in Ex.P.4) which are shown to be grievous, we are inclined to convict him for an offence under Section 326 of I.P.C. for which he stands sentenced to undergo rigorous imprisonment for three years. It appears that from the date of conviction viz. 2 4.04.2002, he continues to be in prison and pending investigation also he was stated to be in prison for a period of six months. The period of imprisonment, if any, already undergone by A.1 would be set off against the sentence of imprisonment imposed by us on him.

b. Coming to the conviction of A.1, A.3 and A.4 for the offence under Section 302 read with 34 of I.P.C. for causing the death of Selva Kumar, we are inclined to set aside that conviction also and acquit all of them of that offence as each one's case has to be considered on their individual overt acts. A.4 is shown to have caused grievous injuries namely injuries 3 and 4 on Selva Kumar which injuries are shown in Ex.P.20 the Post Mortem report. Those injuries are also shown to be cumulatively responsible for the death of the victim in this case. From the materials on record we do not find the requisite intention as would come within 'firstly'; 'secondly' and 'thirdly' or knowledge within clause 'fourthly' of Section 300 I.P.C. Having regard to the circumstances under which the occurrence had taken place during which the victim came to be assaulted, we are of the opinion that A.4 had knowledge that his act as referred to above is likely to cause death of Selva Kumar (D.2) and, therefore, his act would fall under Section 304 Part II I.P.C. for which he would stand sentenced to undergo five years rigorous imprisonment.

c. As far as A.3 is concerned, the injury caused by him on Selva Kumar (D.2) (Injury No: 2 shown in Ex.P.20) is a laceration on the left leg of 3 x 1 x 0.5 cm. He had used only a stick for causing that injury. That injury is not shown to be grievous in nature. Therefore, his act would fall only under Section 324 of I.P.C. for which he would stand sentenced to undergo two years rigorous imprisonment. The period of imprisonment, if any, already undergone by A.3 and A.4 would be set off against the sentence of imprisonment imposed by us on A.3 and A.4.

d. Coming to the act of A.1, he is admittedly shown to have used the blunt side of the weapon against Selva Kumar (D.2). Going by the judgment of the Hon'ble Supreme Court of India reported in 1993 Crl. L.J. 64 (Hardev Bhanji Joshi vs. State of Gujarat) and the decision of the Division Bench of this Court reported in 1989 L.W. (Crl.) 496 (Kuttappan @ Sugathan, in re) we are inclined to alter A.1's conviction and hold him guilty for the offence under Section 304 Part II for which offence he would stand sentenced to undergo rigorous imprisonment for five years. Any period of imprisonment either as a pretrial prisoner or after conviction would be set off against the sentence of imprisonment imposed on him by this Court."

This criminal appeal is disposed of accordingly.

Index : Yes
Website: Yes

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Copy to :

1. The Addl. Sessions Judge
(Fast Track Court), Salem.

2. " thr.
The Principal Sessions Judge,
Salem.

3. The District Collector,
Salem.

4. The Superintendent of Police,
Central Prison,
Coimbatore.

5. The Director General of Police,
Chennai.

6. The Inspector of Police,
Edapadi Police Station.

7. The Public Prosecutor,
High Court,
Madras.